

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Policy and Rules Concerning )  
the Interstate, Interexchange Marketplace )

Implementation of Section 254(g) of the )  
Communications Act of 1934, as amended )

CC Docket No. 96-61

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REPLY COMMENTS OF THE INFORMATION  
TECHNOLOGY ASSOCIATION OF AMERICA

The Information Technology Association of America ("ITAA"), by its attorneys, hereby replies to the comments that were filed in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding on April 25, 1996.<sup>1</sup>

I. SUMMARY

As set forth more fully below, the Commission should continue to prohibit the bundling of customer premises equipment ("CPE") and interstate interexchange services by both dominant and non-dominant interexchange carriers ("IXCs"). As the record of this proceeding makes clear, bundling would needlessly raise the price of interexchange services, limit consumer choice and disserve the public interest. The Commission should also reject AT&T's proposal that the Commission issue a further notice of proposed rulemaking to examine whether the

<sup>1</sup> See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking, CC Docket No. 96-61, FCC 96-123 (released Mar. 25, 1996) [hereinafter "Notice"]. Unless otherwise specified, all comments cited herein were filed on April 25, 1996 in response to Section VIII of the Notice.

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bundling of basic transmission services and enhanced services should be permitted. As is true of CPE, the bundling of basic and enhanced services would disserve the public interest.

## **II. THE COMMISSION SHOULD NOT RELAX OR ELIMINATE ITS PRO-CONSUMER, PRO-COMPETITIVE UNBUNDLING REQUIREMENT**

In the Notice, the Commission acknowledges that the unbundling of regulated communications services and unregulated CPE has proven to be of significant value to consumers.<sup>2</sup> The comments reflect widespread recognition of just how invaluable unbundling has been in promoting the development of a competitive CPE market. Typical are the comments filed by the Consumer Electronics Retailers Coalition ("CERC"), which explain that:

The antibundling rule has spawned the dramatic growth in the variety of telephones . . . answering devices, fax machines, as well as personal computers with modems. Business and retail customers may now purchase CPE in thousands of locations throughout the nation, making their own choices among features, price and service after the sale -- consonant with their particular requirements -- and confident that the equipment is compatible with the telephone network.<sup>3</sup>

In the words of MCI, "[t]hat the rule has served well is beyond any legitimate dispute . . . ."<sup>4</sup>

The essential question, then, is why the Commission is even contemplating a change in a rule that, by all accounts, has served the public interest remarkably well and that continues to be needed. As entities representing consumers, equipment manufacturers and

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<sup>2</sup> See id. at ¶ 86.

<sup>3</sup> Comments of Consumer Electronics Retailers Coalition at 7-8 [hereinafter "CERC Comments"].

<sup>4</sup> Comments of MCI Telecommunications Corporation at 24 [hereinafter "MCI Comments"].

equipment vendors have persuasively demonstrated, eliminating the unbundling rule would limit consumer choice and expose consumers to potentially abusive marketing practices.<sup>5</sup>

First, permissive bundling would reduce the number of CPE options available to consumers. As CERC notes, "it would be impossible for a carrier to put together a bundle of services and equipment that would satisfy every customer. To allow carriers to pick and choose . . . which CPE to bundle . . . with transmission services would inevitably result in consumers being forced to choose among packages, none of which represents the ideal."<sup>6</sup> MCI concurs in this assessment:

It would be a mistake to assume, presumptively, that consumers will benefit if they are allowed to purchase "packages" [from carriers]. The practical effect of such an approach would be that consumers would need to pay for a product they did not want and, accordingly, they would be made to pay additionally for the product they really wanted.<sup>7</sup>

ITAA agrees that "these results are 'consumer-unfriendly,' to say the least."<sup>8</sup>

ITAA also shares IDCMA's concern that major carriers will likely partner with a small number of CPE manufacturers, forcing those manufacturers without alliances out of the market and discouraging those in alliances from developing intelligent CPE that would compete

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<sup>5</sup> See, e.g., Comments of Pennsylvania Public Utility Commission at 11-13 [hereinafter "PAPUC Comments"]; Comments of Alabama Public Service Commission at 10 [hereinafter "APSC Comments"] ("We see no benefit in relaxing the unbundling requirement; however, we do see the opportunity for price discrimination and loss of choices for the consumer if carriers are allowed to bundle CPE and interexchange services").

<sup>6</sup> CERC Comments at 6.

<sup>7</sup> MCI Comments at 25.

<sup>8</sup> Id.

with the services of their "carrier-patrons."<sup>9</sup> Consumers cannot possibly benefit from policies which encourage such alliances, where the service provider's negotiating power and judgment are substituted for those of the consumer.<sup>10</sup>

Second, bundling will discourage innovation, not only by reducing the number of CPE firms, but also by limiting the incentives of the remaining firms to innovate. The IXC's, after all, have "little, if any, incentive to offer consumers equipment that will decrease demand for network-based facilities and services."<sup>11</sup> When faced with the question whether intelligence should be CPE-based or network-based, IXC's will always choose the network. CPE manufacturers traditionally have made the opposite choice. Consumers have benefitted from this competition, which can only be expected to increase as network elements become more and more unbundled. Consumers would be denied the benefits of this healthy competition between carriers and manufacturers if the IXC's were permitted to bundle their services with highly subsidized, but less "intelligent," CPE.

Third, bundling raises fundamental consumer protection concerns. As explained by the Pennsylvania Public Utility Commission, bundling will allow IXC's to use "low-cost" CPE to lure customers -- both business and residential -- into accepting disadvantageous or

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<sup>9</sup> See Comments of Independent Data Communications Manufacturers Association at 19-20 [hereinafter "IDCMA Comments"].

<sup>10</sup> See also MCI Comments at 24 n.38 ("bundling locks customers into a vendor and perhaps even a technology, thus diminishing the vitality of marketplace competition").

<sup>11</sup> IDCMA Comments at 17.

unreasonable service terms.<sup>12</sup> In this regard, the Alabama Public Service Commission ("APSC") correctly notes that bundling will prevent consumers from receiving clear pricing information. The APSC's concerns are not theoretical; they are based on the practical, day-to-day consumer frustration and confusion caused by lack of straightforward pricing information and signals.<sup>13</sup> Moreover, as ITAA noted in its initial comments, the unfairness of bundling will be compounded by the fact that even those customers that opt not to acquire bundled CPE will be required to subsidize the bundled CPE used by others.

ITAA recognizes that several non-carriers and, not surprisingly, most carriers support at least a permissive bundling rule. A review of the non-carrier comments reveals that their primary interest (where an interest is expressed) is in permitting one-stop shopping and in eliminating the transaction costs supposedly associated with purchasing unbundled CPE.<sup>14</sup> The unbundling rule, however, does not prevent one-stop shopping. Carriers remain free to sell or lease CPE to any subscriber or potential subscriber at any competitive price and term they

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<sup>12</sup> See PAPUC Comments at 12. Cf. Comments of Tennessee Attorney General at 5-6 (not commenting on bundling per se, but expressing concern that bundling and detariffing limit consumers' ability to determine the cost of service); Comments of Ohio Consumers' Counsel at 9 (consenting to bundling, but arguing that tariffing requirements should be retained so that consumers can know, in advance, the true cost of the services to which they are subscribing).

<sup>13</sup> See APSC Comments at 9-11. MCI acknowledges this problem. It notes that one disadvantage of bundling is that "[t]he true cost of CPE is hidden in a bundle, thus depriving consumers of the ability to make independent decisions based on features and price." MCI Comments at 24 n.38.

<sup>14</sup> See Comments of American Petroleum Institute, passim; Comments of Florida Public Service Commission at 17-19; Comments of Louisiana Public Service Commission at 9-11.

choose. They are thus in a position to minimize their customers' transaction costs. The only thing that carriers may not do is recoup the cost of the CPE through their service charges.

For their part, the carriers offer little support for eliminating the unbundling rule, other than bald assertions that the rule is no longer necessary and that consumers would benefit from its elimination.<sup>15</sup> They certainly do not purport to weigh the demonstrable benefits and minimal costs of the current rule against the significant costs and speculative benefits of allowing bundling. The carriers' interest in bundling is, of course, understandable. As transmission services become more and more commodity-like, it will be increasingly difficult for an individual carrier to differentiate itself from others based solely on the inherent quality of its offerings. Bundling could offer each carrier an additional basis upon which to differentiate itself from others. The public interest, however, does not lie in facilitating the carriers' efforts to enhance their marketing tools.<sup>16</sup> Rather, the public interest lies in preserving highly competitive markets where they exist, promoting competition in less-than-competitive markets, and, in the process, protecting consumers from harmful marketing and pricing practices. The unbundling rule is essential to each of these ends.

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<sup>15</sup> See, e.g., Comments of AT&T Corp. at 27 [hereinafter "AT&T Comments"]; Comments of Sprint Corporation at 28.

<sup>16</sup> Indeed, ITAA believes that the public interest is best served by policies which hasten the day when transmission services are available on a commodity basis.

### **III. THE COMMISSION SHOULD REJECT AT&T's REQUEST TO ALLOW THE BUNDLING OF BASIC AND ENHANCED SERVICES**

AT&T's comments in this proceeding are not limited to the bundling of CPE. Citing the robust, diverse and "highly fragmented" nature of the enhanced services market, AT&T suggests that the public would somehow benefit if carriers were also allowed to restrict consumer choice in the information services marketplace by bundling basic and enhanced services.<sup>17</sup> In essence, AT&T has asked the Commission to undo years of effort and to turn its back on the regulatory framework which has spawned the enhanced services market, just as the benefits of those efforts are beginning to materialize on a broad scale.

ITAA will not burden the Commission with a recitation of the lengthy history of the Computer Rules (or with lengthy arguments which play to AT&T's interest in having the Commission consider this issue now). The long-recognized, critical fact is that non-carrier enhanced service providers ("ESPs") require access to unbundled network services at competitive prices and on nondiscriminatory terms in order to succeed. Non-carrier ESPs are beholden to the IXCs for the basic transmission services they need to provide their services to their customers. The history of the Commission's Computer Inquiries is, in part, the history of separating basic network services from enhanced services and minimizing the opportunities for carriers to discriminate in favor of their own enhanced services.

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<sup>17</sup> See AT&T Comments at 28-30. MCI's assumption that elimination of the CPE unbundling requirement would necessarily result in the elimination of the enhanced services unbundling requirement is misplaced. See MCI Comments at 22 n.33. Procedurally, the Commission has not sought comment on this issue and therefore cannot, consistent with the Administrative Procedures Act, modify the unbundling rule as it applies to enhanced services in this proceeding. Substantively, MCI's assumption grossly oversimplifies the similarities between CPE and enhanced services.

That the Commission has found the interexchange services market to be "substantially competitive" does not alter the analysis. Although the number of IXC's has grown dramatically, there remain only three IXC's with widely available facilities-based networks. This is an extremely limited market from which ESP's can purchase the ubiquitous transmission services they require.<sup>18</sup> Although regional and niche carriers may at some point play an important role in the marketplace, their networks are not a substitute for national networks. Given the state of the marketplace, there simply is no basis for considering AT&T's proposal.

The realities of the international marketplace provide further evidence of the danger to the public interest presented by AT&T's proposal. ITAA's members often face difficulties in obtaining circuits from foreign service suppliers. These difficulties would be compounded if -- following the lead of the Commission -- foreign carriers were to restrict the availability of unbundled basic services. The Commission should be loathe to encourage such action, particularly at a time when the United States is the acknowledged world leader in information services.<sup>19</sup>

Ultimately, consideration of AT&T's proposal would do nothing but chill the growth of the enhanced services market. AT&T properly recognizes that the enhanced services market is fragmented. This is beneficial in that it provides an environment conducive to new

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<sup>18</sup> Indeed, the three nationwide facilities-based carriers continue to collectively control the bulk of the interexchange market. As of the close of 1995, AT&T, MCI and Sprint accounted for approximately 82 percent of the interexchange market measured by revenues. See Long Distance Market Shares: Fourth Quarter 1995, Common Carrier Bureau, Industry Analysis Division, at Table 6 (Mar. 1996).

<sup>19</sup> U.S. Industrial Outlook 1994, Department of Commerce, International Trade Administration, 25-1 to 25-5 (1994).



entrants and innovation. At the same time, it makes ESPs vulnerable to the types of discrimination in which the IXC's could engage if they were free to bundle basic and enhanced services. To preserve today's competitive environment, the Commission should continue to prohibit IXC's from bundling their basic and enhanced service offerings, and reject AT&T's proposal to revisit this issue.

#### IV. CONCLUSION

For all of the reasons set forth above and in ITAA's initial comments, ITAA urges the Commission to affirm its longstanding and beneficial unbundling requirement for CPE and to reject AT&T's ill-conceived suggestion that the Commission revisit the equally beneficial and longstanding unbundling requirement that applies to enhanced services.

Respectfully submitted,

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May 24, 1996

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